

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
 FOR THE COUNTY OF YAVAPAI

2012 MAR -7 AM 8:57

SANDRA K MARKHAM, CLERK

BY: Jaqueline Hernandez

STATE OF ARIZONA, )

Plaintiff, )

vs. )

JAMES ARTHUR RAY, )

Defendant. )

Case No. V1300CR201080049

Court of Appeals

Case No. 1 CA-CR 11-0895

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
 BEFORE THE HONORABLE WARREN R. DARROW  
 HEARING ON ORAL ARGUMENT RE  
 MOTION FOR PROTECTIVE ORDER

NOVEMBER 1, 2010

Camp Verde, Arizona

**ORIGINAL**

REPORTED BY  
 MINA G. HUNT  
 AZ CR NO. 50619  
 CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2 FOR THE COUNTY OF YAVAPAI  
3  
4 STATE OF ARIZONA, )  
5 Plaintiff, )  
6 vs ) Case No. V1300CR201080049  
7 JAMES ARTHUR RAY, ) Court of Appeals  
8 Defendant ) Case No. 1 CA-CR 11-0895  
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REPORTED BY  
MINA G. HUNT  
AZ CR NO. 50619  
CA CSR NO. 8335

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1 Proceedings had before the Honorable  
2 WARREN R. DARROW, Judge, taken on Monday,  
3 November 1, 2010, at Yavapai County Superior Court,  
4 Division Pro Tem B, 2840 North Commonwealth Drive,  
5 Camp Verde, Arizona, before Mina G. Hunt, Certified  
6 Reporter within and for the State of Arizona.  
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1 APPEARANCES OF COUNSEL:

2 For the Plaintiff:

3 YAVAPAI COUNTY ATTORNEY'S OFFICE  
4 BY: SHEILA SULLIVAN POLK, ATTORNEY  
5 255 East Gurley  
6 Prescott, Arizona 86301-3868  
7 (Appearing by telephone.)  
8  
9

10 For the Defendant:

11 MUNGER TOLLES & OLSON, LLP  
12 BY: TRUC DO, ATTORNEY  
13 355 South Grand Avenue  
14 Thirty-fifth Floor  
15 Los Angeles, California 90071-1560  
16 (Appearing by telephone.)  
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1 P R O C E E D I N G S

2 THE COURT: This is V1300CR201080049, State  
3 versus James Arthur Ray. And I've been informed  
4 that representing Mr. Ray is Ms. Do, who is  
5 appearing telephonically. All of the appearance  
6 are telephonic.  
7

8 Ms. Do, are you there?

9 MS. DO: Yes. Good afternoon, Your Honor.

10 THE COURT: Ms. Polk is present?

11 MS. POLK: Yes, Your Honor.

12 THE COURT: And Cathy Durrer, I understand, is  
13 there as well. Also Pam Moreton, I believe, is on  
14 the line also.

15 MS. MORETON: That's correct.

16 THE COURT: This is the time set for oral  
17 argument. I requested oral argument on this  
18 matter. It's been fully briefed by the parties.  
19 But it really does present a very difficult issue,  
20 in my mind. There are really some important  
21 competing considerations.

22 And, of course, I'm talking about the  
23 motion that has to do with producing the county  
24 attorney's notes or the prosecutor's notes,  
25 interviews of witnesses, having those disclosed.

And I will state at the outset that my  
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1 order with regard to the medical examiners  
2 pertained to the medical examiners. That's what I  
3 was thinking when I drafted that order. It may  
4 have further application.

5 But, anyway, I scheduled this oral  
6 argument, and I would like to hear from the parties  
7 if you care to add anything to the written  
8 pleadings.

9 Ms. Polk, you requested the protective  
10 order.

11 MS. POLK: Yes, Your Honor. Thank you.

12 Judge, first of all, has the defendant  
13 waived his presence for this hearing?

14 THE COURT: Thank you for reminding me of  
15 that.

16 Ms. Do, does Mr. Ray waive his  
17 appearance?

18 MS. DO: He does, Your Honor. And I'm not  
19 sure, but I believe Mr. Kelly or his office has  
20 filed with the Court a written waiver not only for  
21 this hearing but for the upcoming evidentiary  
22 hearings. I hope the Court received it. But if  
23 not, he has waived his appearance.

24 THE COURT: I don't know that I've received  
25 that. I did receive the acknowledgment of the

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1 trial date. I saw that.

2 But I'll accept the waiver for this  
3 proceeding.

4 MS. DO: Thank you.

5 THE COURT: Ms. Polk.

6 MS. POLK: Thank you. Your Honor, I do agree  
7 that this is a very important issue that needs  
8 resolution. The parties have a fundamental  
9 disagreement about whether or not the attorneys'  
10 notes are statements under Rule 15.1(b). I think a  
11 review of the relevant rules, the rules of  
12 evidence, and the relevant cases make -- I think  
13 they clear up this issue. I think when we look at  
14 the relevant cases, there is a clear line of  
15 clarification when we look at what's work product  
16 and what isn't.

17 So I'd like to go through what I think  
18 the correct analysis of this issue is. First of  
19 all, the state does agree absolutely with the  
20 principal that is set forth in State versus Roque,  
21 which is the case found at 213 Ariz. 193. It's a  
22 2006 Supreme Court case. And it's the case that  
23 the Court cited in the last minute entry with  
24 respect to the medical examiners.

25 And there is two principles that are

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1 important set out in that case that we absolutely  
2 agree with. One is that the defense is entitled to  
3 a fair notice of what witnesses will say. And then  
4 specifically with respect to experts' opinions,  
5 that the state must fully and fairly disclose an  
6 expert's opinion.

7 I think the analysis starts with  
8 Rule 15.1(b)(1), which is the state's obligation to  
9 disclose the names and addresses of all the persons  
10 whom the prosecutor intends to call as witnesses in  
11 the case in chief together with their relevant  
12 written and recorded statements, and then more  
13 specifically, Subsection 4 that talks about experts  
14 and, again, our obligation to disclose the names  
15 and addresses of experts who have personally  
16 examined a defendant or any evidence in a  
17 particular case together with the result of  
18 physical examinations, of scientific tests,  
19 experiments and comparisons that have been  
20 completed. That's where Section 4 is more narrow  
21 and seems to be less broad than Subsection 1.

22 And then if we look at Rule 15.1(e)(3),  
23 that states that the prosecutor within 30 days of a  
24 written request shall make available to the  
25 defendant for examination, testing and

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1 preproduction -- I'll just jump down to  
2 paragraph 3. That says, any completed written  
3 reports, statements and examination notes made by  
4 experts listed in the previous section.

5 I think it's clear there that the rules  
6 are contemplating that it's the completed reports  
7 from experts that will be disclosed and not  
8 necessarily any notes, certainly not notes taken by  
9 prosecutors in the process of interviewing  
10 potential experts unless somehow they relate or  
11 become relevant to the expert's opinion. And at  
12 that point they would be incorporated, I would  
13 hope, in the expert's opinion.

14 But I think it's relevant, then, to look  
15 at the definition of "statements" as it is used in  
16 Subsection B(1) and the work product. The  
17 definition of "statement" is in Rule 15.4(a). And  
18 if we can look at Roman numeral III, a "statement"  
19 shall mean the writing containing a verbatim record  
20 or a summary of a person's oral communications.

21 I think there is an argument that  
22 obviously what's in a prosecutor's notes are not  
23 summaries. I think it's clear that this subsection  
24 applies to the police report, the police report  
25 where the detective or the officer either

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1 summarizes the witnesses -- anything learned from  
2 the witness or -- in this case what we've done is  
3 provide transcripts, actual transcripts, of the  
4 officers' and detectives' interviews of prospective  
5 witnesses.

6 And then 2 makes it clear that any notes  
7 that the officers take may be destroyed if they are  
8 contained in the officer's report. What's  
9 relevant, then, is looking at Rule 15.4(b). And it  
10 talks about materials not subject to disclosure.  
11 And that's where we have the work product.  
12 Disclosure shall not be required of legal research  
13 or records, correspondence, records or memoranda to  
14 the extent they contain the opinions, theories or  
15 conclusions of the prosecutor, members of the  
16 prosecutor's legal or investigative staff or law  
17 enforcement officers. And then this rule also  
18 applies to defense counsel and to their staff.

19 Judge, we hold up the history and the  
20 comments behind these rules. And Rule 15.4(a) in  
21 the comments directly answers this question that I  
22 think we are here in oral argument on. And that  
23 comment states that -- this is right under 15.4(a).  
24 It states, it is intended that an attorney's actual  
25 trial notes such as his outline of questions to ask

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1 the witness will be encompassed within the  
2 work-product exception of Rule 15.4(b)(1) even  
3 though they fall within the definition of  
4 "statements."

5 I think that comment is very  
6 enlightening. The comment seems to recognize that  
7 perhaps there is an argument that an attorney --  
8 the argument is being made here that the attorneys,  
9 we are now in preparing this case for trial. We  
10 are interviewing witnesses in anticipation of  
11 examining these witnesses at trial. We are writing  
12 down statements that these witnesses make. And  
13 I -- so that they can be incorporated in our trial  
14 outline.

15 And I think this comment is very much on  
16 point, specifically says that the attorneys' trial  
17 notes are -- is intended that they would be  
18 excluded from discovery because they are work  
19 product.

20 Judge, the -- if we look at Evidence  
21 Rule 502, I think that also sheds light on this  
22 issue, because Evidence Rule 502 is the  
23 attorney-client and the work-product rule. And if  
24 you look at 502(f), definitions, right here in  
25 Evidence Rule 502, it states that "work-product

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1 protection means the protection that applicable  
2 law provides for tangible material or its  
3 intangible equipment prepared in anticipation of  
4 litigation or for trial. And that case is exactly  
5 where the state is now, in the process of sifting  
6 through the many, many potential witnesses for  
7 trial and preparing for trial, trying to identify  
8 who we will call and, of course, taking notes in  
9 connection with that to use when we examine these  
10 witnesses at trial.

11 But that rule of evidence also references  
12 the relevant case law. And that's where I think  
13 that the relevant case law completely supports the  
14 position that the state has taken on this issue.

15 To me the most important case is the  
16 Upjohn case, which is a United States Supreme Court  
17 case from 1981. And the cite is 449 U.S. 383.  
18 That case absolutely stands for the principal that  
19 attorneys' notes are work product.

20 And specifically what happened in the  
21 Upjohn case, in that case the petitioner was a  
22 pharmaceutical manufacturing corporation. And one  
23 of its foreign subsidiaries had paid some  
24 questionable payments to foreign government  
25 officials in order to secure the business.

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1 The IRS for the United States began an  
2 investigation to determine tax consequences of  
3 those acts. And so general counsel for petitioner  
4 issued questionnaires and began interviewing their  
5 officers and employees. The IRS subsequently  
6 demanded the production of the questionnaires and  
7 the attorneys' notes of the interviews. The  
8 attorneys -- the petitioner responded that this was  
9 work product. And so that's the issue and the  
10 facts that were in front of courts in Upjohn.

11 What the Upjohn -- Supreme Court held in  
12 the Upjohn case is that the attorneys' notes are  
13 work product and reveal the mental processes and in  
14 evaluating the communication.

15 And the Court went on in that case to  
16 state that -- and it was quoting from another case,  
17 in re grand jury investigations. But the Court  
18 stated, notes of conversations with a witness are  
19 so much a product of the lawyer's thinking and so  
20 little probative of the witness's actual words that  
21 they are absolutely protected from disclosure.

22 And it was noted that's one line of  
23 cases. And then the Court further stated, those  
24 courts declining to adopt an absolute rule have  
25 nonetheless recognized such material is entitled to

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1 special protection.

2 The Court went on to recognize that there  
3 are some hardship cases. And, of course, now there  
4 is a line of cases from Upjohn that stand for the  
5 proposition that the attorneys' notes taken in  
6 interviewing witnesses are work product. And if  
7 the opposing party can show a hardship, in other  
8 words, that they don't have access to that  
9 information from any other source, including  
10 interviewing the witness himself, then they can  
11 make the argument that they would be entitled to  
12 that information.

13 The Upjohn case was preceded by another  
14 case by the United States Supreme Court. And  
15 that's Hickman versus Taylor, at 329 U.S. 495,  
16 which is a 1947 case. But that case continues to  
17 be good law today. And that case is very, very  
18 relevant to the facts here because the facts in the  
19 Hickman case include the actions by the attorneys  
20 arguably similar to what's happened in this case.

21 Quickly, in the Hickman case it was a  
22 civil case where a tugboat sank while helping to  
23 tow a car across the Delaware River. Several  
24 people drowned. The tugboat's owners engaged a law  
25 firm to defend themselves and to bring a possible

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1 action against one of the other parties.

2 And in that regard the attorneys for the  
3 tugboat company in anticipation of litigation  
4 deposed four survivors, made those statements  
5 available. And those were made available. And  
6 then the attorneys privately interviewed the  
7 survivors with an eye toward litigation.

8 And one year later they ended up in court  
9 in litigation over whether or not the attorneys'  
10 notes from the subsequent interviews with survivors  
11 had to be disclosed.

12 The Supreme Court in Hickman specifically  
13 looked at three categories of information that the  
14 attorneys had generated in anticipation of  
15 litigation. So they looked at all those written  
16 statements. They looked at any statements, any  
17 facts, concerning the case which the attorney  
18 learned through oral statements made to the  
19 attorney and the attorney's notes in that regard.

20 And then the third category that the  
21 requesting party wanted were the attorneys' notes  
22 or they wanted the notes submitted to the Court in  
23 order that they could be redacted.

24 But the Hickman case clearly involved  
25 subsequent meetings with witnesses by the attorneys

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1 in anticipation of litigation and the opposing  
2 party's request for those notes. And the Hickman  
3 court reiterated that that is clearly work product.

4 And I just want to quote from page 508 of  
5 that Supreme Court decision because I think it's so  
6 relevant to what we're talking about. And what the  
7 Court wrote is, we are dealing with an attempt to  
8 secure the production of written statements and  
9 mental impressions contained in the files and in  
10 the mind of the attorney without any showing of  
11 necessity or any indication or claim that denial of  
12 such production would unduly prejudice the  
13 preparation of petitioner's case or cause him any  
14 undue hardship or injustice.

15 And so the -- I believe that the -- and  
16 those cases are still good today. The line of  
17 cases from Hickman through Upjohn and forward  
18 continued to reiterate the principal that when  
19 attorneys interview witnesses in anticipation of  
20 trial, those are their work product. And the only  
21 way opposing counsel get it is if they can show  
22 some hardship, in other words, that information is  
23 not otherwise available.

24 There are three cases in Arizona that  
25 have been cited by both parties. And I believe

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1 those cases are distinguishable for several  
2 reasons. The Arizona cases that are set forth in  
3 both the state's pleading and the defense's  
4 pleading are the State versus Reed, State versus  
5 Nunez and State versus Justin cases.

6 First of all, I would note that two of  
7 the three of those precede the Upjohn case and  
8 don't discuss at all the Upjohn case and what the  
9 United States Supreme Court has said about work  
10 product and attorneys' notes from witness  
11 interviews.

12 I think that's an important distinction.  
13 I think it's important for the parties and for the  
14 Court to note that these three cases simply don't  
15 discuss the Hickman or the Upjohn cases from the  
16 United States Supreme Court. Clearly Upjohn would  
17 supersede these three cases to the extent that they  
18 touch upon the work-product issue.

19 The State versus Nunez case is found at  
20 23 Ariz. App. 462. It's a 1975 case. And, again,  
21 Upjohn is 1981. But that case is about a page and  
22 a half long. It had to do with a purse snatching  
23 incident. And what's clear from that case is that  
24 the prosecutor met with one of the witnesses, and  
25 there was no disclosure made. And so during trial

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1 the defense learned for the first time what this  
2 witness is going to say.

3 The Court in Nunez says that those notes  
4 are not work product under the Arizona Criminal  
5 Rule 15.4. Then the Court noted that it was  
6 harmless error because disclosure had been  
7 accomplished in the trial itself.

8 I'm not sure I agree with -- it's very  
9 light treatment of the issue, in other words.

10 There's very little discussion of the facts.

11 What's clear is that no disclosure of that  
12 witness's statements had been made. And what's  
13 clear in that case is that the United States  
14 Supreme Court case is talking about work product,  
15 which is not discussed at all.

16 The State versus Reed case is 114 Ariz.  
17 16. It's a 1976 case. Again, it predates Upjohn.  
18 Again, it does not discuss Hickman. In that case  
19 that's a -- the defendant was convicted of first  
20 degree murder, armed robbery. He, essentially, had  
21 gone on a crime spree in Tucson doing home  
22 invasions in three different homes and killing one  
23 person in the process.

24 The county attorney took some notes but  
25 made no disclosure of that witnesses's particular

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1 testimony. And it appears from that case as well  
2 that this was a witness who took the stand, and,  
3 again, the defendants had no notice of what this  
4 witness was going to say.

5 That case, the Reed case, does not  
6 analyze work product at all. It just simply says  
7 that the state made no disclosure of the witness's  
8 testimony. The state's defense was that, well,  
9 they didn't have a report from law enforcement.  
10 And the Court said, well, then your notes have to  
11 be disclosed. Which is a principle, Your Honor,  
12 that I don't disagree with.

13 If disclosure of what witnesses are going  
14 to say is not otherwise made by law enforcement and  
15 if the prosecutor is the only one who witnesses --  
16 who interviews the witness and memorializes what  
17 that witness is going to say, then yes. I think  
18 they would have to disclose that.

19 The practice in this office is to make  
20 sure that doesn't happen. If we encounter a  
21 witness who has not been interviewed, we direct law  
22 enforcement to interview that witness, to make a  
23 report so that we can get it disclosed. But that  
24 case is distinguishable for both of those points.

25 And then the Justin case, which comes  
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1 after Upjohn just by a few months -- it's a 1981  
2 case -- that also is a very -- well, that case  
3 involved a defendant who killed the manager of a  
4 Phoenix business. And in that case it's  
5 distinguishable because there was a police report  
6 cut. The prosecutor met with one of the witnesses,  
7 a secretary for the deceased. And that secretary  
8 specifically told the prosecutor the police report  
9 was wrong.

10 That was never disclosed to the defense  
11 in that case. And it was only until the witness  
12 was on the stand that the witness said that she had  
13 told the prosecution that the police report was  
14 wrong.

15 And so the Court in that case said, well,  
16 then the prosecutor's notes only to the extent that  
17 they have additional information not otherwise  
18 disclosed would have to be disclosed in order to  
19 fulfill the principle of giving fair notice to the  
20 defense what a witness is going to say.

21 And that case, even though it postdates  
22 the Upjohn case by about six months, it does not  
23 discuss work product at all.

24 And then, finally, there is a 1977 court  
25 of appeals case out of Arizona, State versus

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1 Roland. And the cite is 114 Ariz. 355. And in  
2 that case the Court states the principal that the  
3 state is not required to provide a word-by-word  
4 preview of a witness's statement. There is no  
5 discussion of the attorney's notes in this case at  
6 all.

7 But in this case the prosecutor prior to  
8 trial had told the defense that the witness's  
9 testimony had changed since the preliminary  
10 hearing. And the Court found no disclosure  
11 violation there without a whole of lot of  
12 discussion.

13 But, Your Honor, it's interesting that  
14 those four cases that I just talked about seemed to  
15 be the end of the discussion in Arizona about work  
16 product. And I think the reason is that we have  
17 those four cases, all of them distinguishable on  
18 the facts themselves. But in addition to that,  
19 they predate the United States Supreme Court case  
20 in Upjohn where the Court comes out in a very  
21 strong opinion making it very clear that attorneys'  
22 notes from interviews with witnesses are work  
23 product.

24 And I think from that point forward in  
25 Arizona the matter is settled. This issue does not

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1 come up because it's clear that the attorney's  
2 notes are work product and that the only exception  
3 would be if what a witness is going to say is not  
4 otherwise disclosed to the defense.

5 And then the last case, Judge, that I  
6 think is relevant and I'd like to talk about is the  
7 State versus -- I'm sorry. It's in re Cendant  
8 case. This is a 2003 case from the Third Circuit.  
9 And the cite is 343 F.3d 658. This case does  
10 discuss Hickman. It does discuss Upjohn and the  
11 line of cases that reaffirm the work-product  
12 protection for attorneys' notes taken interviewing  
13 witnesses in anticipation of trial.

14 And I think the Cendant case is  
15 instructive to all of us because it reaffirms work  
16 product. And then it also reaffirms this hardship  
17 rule, which is that there is an avenue where courts  
18 will look at what -- work product and decide that  
19 in spite of work product, some limited disclosure  
20 is mandated because the information is not  
21 otherwise available.

22 The Cendant case sums up, quite frankly,  
23 Your Honor, the impact that these disputes are  
24 having on the state. We have a trial date now of  
25 February 16. There are, I'm just estimating,

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1 approximately a hundred witnesses that have been  
2 contacted by law enforcement with reports  
3 generated. We're in the process of trying to sift  
4 through all of that, identify the witnesses we will  
5 call to trial and when we talk to our witnesses,  
6 prepare our trial outlines so we can be ready to go  
7 on the 16th.

8 Hanging over our head is this position by  
9 the defense that they are entitled to all of this  
10 work that we are doing. And, frankly, it's having  
11 a chilling effect here in this office as our team  
12 is trying to get ready for a trial that encompasses  
13 so, so many witnesses.

14 So I want to quote from the Cendant case.  
15 And I'm quoting from 343 F.3d 658 at page 662. And  
16 in this case the Court says, in performing his  
17 various duties, it is essential that a lawyer work  
18 with a certain degree of privacy free from  
19 unnecessary intrusion by opposing parties and their  
20 counsel. Proper preparation of a client's case  
21 demands that he assemble information, sift what he  
22 considers to be the relevant from the irrelevant  
23 facts, prepare his legal theories and plan his  
24 strategy without undue and needless interference.

25 That is the historical and the necessary  
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1 way in which lawyers act within the framework of  
2 our system of jurisprudence to promote justice and  
3 to protect the client's interest. This work is  
4 reflective, of course, in interviews, statements,  
5 memoranda, correspondences, briefs, mental  
6 impression, personal beliefs and countless other  
7 tangible and intangible ways aptly, though roughly,  
8 termed as the work product of the lawyer.

9 Where such material is open to opposing  
10 counsel on mere demand, much of what is now put  
11 down in writing would remain unwritten. An  
12 attorney's thoughts theretofore inviolate would not  
13 be his own. Inefficiency, unfairness and sharp  
14 practices would inevitably develop in the giving of  
15 legal advice and in the preparation of cases for  
16 trial.

17 The Cendant case does reaffirm the  
18 hardship rule. And in Arizona that hardship rule  
19 is set forth in Rule 15.1(g). And that's where  
20 upon motion of a defendant showing that the  
21 defendant has a substantial need in the preparation  
22 of the defendant's case for material or information  
23 not otherwise covered by Rule 15.1 and that the  
24 defendant is unable without undue hardship to  
25 obtain this substantial equivalent by other means,

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1 the Court in its discretion may order any person to  
2 make it available.

3 So, Judge, in closing, I agree, again,  
4 with the principal that the defendant is entitled  
5 to fair notice of what witnesses are going to say  
6 and is entitled to know specifically what the  
7 opinions of the experts will be.

8 With respect to the expert that the state  
9 noticed -- his name is Rick Ross -- the state is in  
10 the process of providing information to him. And  
11 we anticipate that he will then have some opinions  
12 and he would be available for an interview by the  
13 defense.

14 But for the defense at this juncture to  
15 demand the state's notes taken when we were in the  
16 process of retaining him is simply unsupported by  
17 the rules and unsupported by the cases. None of  
18 that allows -- the rules and the cases do not allow  
19 the defendants to demand that information from the  
20 state with respect to this expert and with respect  
21 to all of the witnesses that we are in the process  
22 of interviewing in preparation, in anticipation, of  
23 trial.

24 Thank you, Your Honor.

25 THE COURT: Thank you, Ms. Polk.

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Ms. Do.

MS. DO: Thank you, Your Honor.

I think it's first really important to understand how this actual dispute arose. There are facts that the state simply has ignored both in its briefing and in its presentation to the Court just a moment ago.

With about less than three weeks before we were set for the November 9 evidentiary hearing, Your Honor, the state simply surprised the defense with late notice of a brand new expert witness that it intended to call not only for trial but for the evidentiary hearing.

So we received about three weeks notice that the state had a new expert witness that it intended to call for the 404(b) hearing. The state gave Mr. Ray late notice with nothing more than a curriculum vitae and a five-word statement that Mr. Ross will testify to group behavior. The state also told Mr. Ray that it was not going to have Mr. Ross prepare a report.

Now, at that juncture Mr. Ray was facing a brand new expert witness which he received late notice of and no statement. So given what Ms. Polk has just said, that she agrees the disclosure rules

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require fair notice of witnesses and statements, the state did not comply with those rules.

Now, I understand that the state has withdrawn Mr. Ross for purposes of the evidentiary hearing. The state did not tell the defense that. We learned of it by reading it in a footnote in the motion for protective order.

I think that had the state contacted us, communicated with us about their withdrawal of this witness, we probably would have headed off much of the dispute that is before the Court now.

But given the background, this is the reason why Mr. Ray then sends a written request asking the state for discovery of the witnesses it intended to call within three weeks notice.

If I may, Your Honor, I think it's also important to focus this court's attention to what Mr. Ray actually requested from the state and on the events that actually happened and not engage in the state's theoretical talk about slippery slopes and events that have not happened.

I understand why the Court was perhaps alarmed when it received the motion for protective order and was concerned about the competing interests that are at play here. But I think the

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state in its moving paper grossly exaggerated what Mr. Ray is asking for here and is talking about events that simply have not transpired.

I imagine that the competing interests that the Court is concerned with is, one, an attorney's work product; that an attorney's opinions, conclusions, thoughts about the case, trial strategies, are protected. And we don't disagree with that.

But I think if the Court looked at Mr. Ray's request, which is written in a letter attached to both papers, he asks for the statements of a witness that the state was going to call.

The other balance to this competing interest must be Mr. Ray's right to a fair trial. It must be Mr. Ray's right to have fair notice of witnesses and what they're going to testify to. I think this court has time and time again asked the parties to comply with the rules and proper procedure and to ensure this is not going to be a trial by surprise.

I think that the background is important. And the state seems to forget that it, essentially, surprised Mr. Ray with a brand new witness and provided no disclosure and expected Mr. Ray to be

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ready to confront and cross-examination this expert in three weeks time.

Even though the state has now withdrawn Mr. Ross for purposes of this evidentiary hearing, I do not believe that that changes the analysis. I don't believe that that changes the state of the law in Arizona.

Ms. Polk made a few points that I would like to address very quickly. She tried to distinguish the cases that are dispositive and controlling in Arizona, decided by the Arizona Supreme Court as being cases that precede Upjohn.

But I think what the state fails to realize is that Upjohn dealt with the federal rules of discovery. That is not what is controlling in this case. It is a case in Arizona state court, which means that the Arizona Rules of Criminal Procedure, the disclosure rules, and then the Arizona law applies.

And I don't think that her attempt to distinguish those cases is successful because those cases are still the law in Arizona. The disclosure rules, I think, are really quite clear. The state is required to provide Mr. Ray with any and all statements made by their testifying experts.

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1 They did not retain Mr. Ross. They did  
2 not notice Mr. Ross as a consulting witness. They  
3 noticed Mr. Ross as a testifying expert for both at  
4 trial and previously for the evidentiary hearing.

5 The cases of Reed, Nunez and Justin, all  
6 good law still, Arizona law, make it clear that  
7 oral statements that have been memorialized in  
8 prosecutor notes are, one, not work product,  
9 because what a witness says is not the opinions,  
10 thoughts or conclusion of an attorney. It's  
11 evidence. It's evidence the state intends to use  
12 to prosecute Mr. Ray.

13 It also says that these statements fall  
14 within the ambit of the rules of disclosure.  
15 Ms. Polk tried to distinguish 15.4, definition of a  
16 "statement," which states specifically it  
17 contains -- I'm sorry. Specifically includes  
18 summary of oral communication as being some sort of  
19 reference to police report. Well, that is nowhere  
20 in the rule. It's not in the comments, and it's  
21 not in the cases.

22 The cases cited by the state, in addition  
23 to the ones we cited, Your Honor, make it clear  
24 that if you have a witness who makes a statement  
25 orally to a prosecutor and the prosecutor writes

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1 down that factual statement, it falls within the  
2 disclosure rules.

3 Justin clearly states, and I read 130  
4 Ariz. 1 at page 4, quote, Rule 15.1(a) requires the  
5 state to produce the names and addresses of all  
6 persons whom the prosecutor will call as witnesses  
7 in the case in chief together with their relevant  
8 written or recorded statements.

9 Rule 15.4, Subsection (a)(1),  
10 Subsection (3) defines "statements" to include a  
11 writing containing a summary of a person's oral  
12 communications. The prosecutor's notes, while  
13 short and predominantly cryptic, do reflect what  
14 the witness said to the prosecutor about the  
15 incident. The notes are a statement that should  
16 have been disclosed.

17 Justin clearly doesn't allow for an  
18 exception where the oral communication is contained  
19 within a police report.

20 And I again want to bring it back to the  
21 circumstances that originated this dispute. And  
22 that is we had a witness from whom we had no idea  
23 what his testimony was going to be. And the state  
24 indicated to us they had no intention of having  
25 this expert write a report.

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1 And for the state now to say we had an  
2 opportunity to interview this witness, I think, is  
3 disingenuous because they were going to call him at  
4 the evidentiary hearing giving us less than three  
5 weeks time to go out and interview this person.

6 I also think that the state's citation of  
7 the Rule 15.4(a) comment that it is intended that  
8 an attorney's actual trial notes, such as his  
9 outline of questions to ask a witness, will be  
10 encompassed within the work-product exception of  
11 Rule 15.4(b)(1) is completely inapposite here.

12 We have never asked the state to produce  
13 notes containing work product. We have never asked  
14 the state to produce an outline of their questions.

15 As a matter of fact, the hundred-plus  
16 witnesses the state has noticed for trial,  
17 Your Honor, we have never sought the attorney's  
18 notes even though they might contain statements of  
19 those witnesses because we have police reports and  
20 we have their statements that have been audio  
21 recorded. We have notice and fair warning of what  
22 they're going to say. We don't have that here in  
23 this case with Mr. Ross, nor did we have it with  
24 the medical examiners, which is why the Court had  
25 ordered those notes produced.

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1 At this juncture if Ms. Polk is going to  
2 indicate that she's going to have the expert write  
3 a report upon which we can conduct an interview,  
4 then I can see her point. But back two, three  
5 weeks ago we didn't have any of that. And the  
6 state did not tell us that they were going to  
7 withdraw this witness as an expert for the  
8 evidentiary hearing.

9 I don't think the state has demonstrated,  
10 Your Honor, good cause under 15.5(a), which governs  
11 the issuance of a protective order. This is not a  
12 case in which disclosure would result in a risk or  
13 harm outweighing the usefulness of the disclosure  
14 to any party.

15 We're not talking about a victim whose  
16 identity should be protected for his or her safety.  
17 We're talking about an expert witness who is going  
18 to testify for whom we have no discovery of his  
19 opinion or conclusions or thoughts about the case.

20 The state also has not demonstrated that  
21 the risk, even though there isn't one, cannot be  
22 eliminated by a less substantial restriction of  
23 discovery rights. Again, to the extent that the  
24 state has notes that reflect its work product, its  
25 true work product, opinions, thoughts or

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1 conclusion, we would assume that the state would  
2 redact that as it did with the medical examiners.  
3 I think there is a less substantial  
4 restriction to allow Mr. Ray to what he's entitled  
5 to under the discover rule and at the same time  
6 protect the state's right to shield it's work  
7 product.

8 But I think the state, essentially, just  
9 jumped to this motion for protective order without  
10 any attempt to meet and confer with the defense.  
11 And I think that the discussion about a slippery  
12 slope is all theoretical and it's not warranted  
13 here.

14 Mr. Ray has never sought the work product  
15 of the state. We're not interested in their trial  
16 outlines, questions. We simply are asking for the  
17 statements of an expert the state intends to call  
18 to testify against Mr. Ray.

19 I think that I'm -- the state has yet to  
20 explain why it withheld information about Mr. Ross  
21 for nearly a month when the rule also clearly  
22 requires timely disclosure of new information. I'm  
23 particularly disturbed by the fact that we had a  
24 status conference on October 4 at which we were  
25 discussing the very evidentiary hearings that are

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1 at dispute now, at which point the Court reminded  
2 the parties to comply with the disclosure rules.

3 And the state, essentially, sat in  
4 knowing silence, failed to mention it had retained  
5 a new expert, failed to mention that it was going  
6 to call a new expert, withheld that information for  
7 nearly a month and then surprised Mr. Ray with a  
8 notice of this new witness.

9 I, quite frankly, don't understand the  
10 state's conduct with respect to discovery in this  
11 case. Mr. Ray expects a fair trial from the state,  
12 and that's what he's asking. We, again, are not  
13 asking for the notes of the prosecutors that  
14 contain any work product. And to the extent the  
15 state and the Court have concern, I think the state  
16 should turn over those notes to the Court, as  
17 15.5(a) also requires, and have the Court review  
18 it. And if the Court feels it is work product,  
19 then the protective order is properly issued.

20 Otherwise I think our request is narrowly  
21 scoped, narrowly defined, to seek what we were  
22 entitled to under 15.1, and that is the statement  
23 of an expert who is going to testify.

24 The last thing I would point out,  
25 Your Honor, is that some of the cases Ms. Polk just

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1 raised -- I'm not sure it was briefed in the reply.  
2 I did look at the one case that was new to the  
3 reply. And that was Dean. And I would just note  
4 that that's a 1958 personal-injury action that  
5 deals with the civil rules of discovery, not the  
6 criminal rules of discovery, which are broader,  
7 designed to protect the constitutional rights of  
8 the accused to a fair trial.

9 Thank you.

10 THE COURT: Thank you, Ms. Do.

11 Ms. Polk.

12 MS. POLK: Thank you, Your Honor. Your Honor,  
13 I think the comments illustrate the very  
14 fundamental disagreement that the defense and the  
15 state have over attorney's notes. Ms. Do made the  
16 comment that Arizona Rule 15.1 covered any and all  
17 statements made by a witness. That is inaccurate.

18 The 15.1 says that the state shall  
19 disclose the names and addresses of all person  
20 together with their relevant written and recorded  
21 statement. Nowhere in these rules is there the  
22 requirement that anytime a statement is written  
23 down that's made by a witness that that piece of  
24 paper has to be disclosed to the defense.

25 I'm not quite sure what I'm hearing.

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1 Because on the one hand, I'm hearing that from the  
2 defense that we wouldn't be in this position today  
3 if they had had more time to interview Rick Ross.  
4 But on the other hand, I'm hearing Ms. Do say that  
5 Arizona cases make it clear that if a witness makes  
6 a statement to an attorney, the attorney writes it  
7 down, that it is discoverable.

8 And I think that is at the heart of this  
9 dispute. That is the defense's position, that  
10 anytime an attorney writes down a statement made to  
11 us by a witness that that statement becomes  
12 discoverable. And it appears that her position is  
13 the state, then, has an obligation to go through  
14 notes that we take, notes that are clearly work  
15 product, and redact thoughts, theories -- I can't  
16 remember what else she said -- but leave statements  
17 made by witnesses, and we've got an obligation to  
18 disclose that.

19 That is not required under Arizona law,  
20 and that is not required under federal law and  
21 certainly by the United States Supreme Court. And,  
22 again, I would point the Court to the comment under  
23 Rule 15.4(a), which it specifically talks about  
24 work product. And it says, it's intended that an  
25 attorney's actual trial notes, such as his outline

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1 of questions to ask the witness, will be  
2 encompassed within the work-product exception.  
3 So I think we do have a fundamental  
4 disagreement as to what the underlying obligation  
5 is. And I think that that fundamental disagreement  
6 is having a chilling effect on the state's ability  
7 to prepare for trial.

8 Some comments were made about disclosure  
9 violations by the state. I believe the defense  
10 has -- Ms. Do has mischaracterized what has  
11 occurred. First of all, the state did intend to  
12 use Rick Ross as a witness at the 404(b) hearing.  
13 Upon sitting down and looking at the issue further,  
14 we made the decision not to call him after all.  
15 And we immediately informed Ms. Do of that in the  
16 form of a pleading. And we put that in a footnote,  
17 and then we filed a pleading withdrawing him as a  
18 witness. And that pleading was made available to  
19 the defense as soon as we made that decision. And  
20 certainly that was known by the defense before  
21 response in this motion for protective order was  
22 filed.

23 It is an unfair -- or a  
24 mischaracterization of the events to suggest that  
25 we had retained Mr. Ross 30 days before we  
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1 disclosed him. In fact, we received back from  
2 Mr. Ross a letter retaining him on September 30.  
3 And by October 14 we had done a supplemental  
4 disclosure with everything we had about Mr. Ross at  
5 that point.

6 We made it clear to the defense that he  
7 had been retained. We let them know of his  
8 curriculum vitae. We have given them the retainer  
9 agreement. And that's all we have at this point.

10 Very similar, I would like to point out,  
11 Your Honor, to the expert that the defense has  
12 listed is Dr. Ian Paul, with the medical examiner's  
13 office out of New Mexico. I have not accused the  
14 defense of a discover violation in that regard.  
15 But I simply point out that they have noticed him  
16 as an expert and they have let us know that he is  
17 in the process of reviewing documents and will be  
18 ready for an interview when he's completed that  
19 review.

20 And my response to that is that's fine.  
21 We will then wait. And that's the position we are  
22 with Mr. Ross. I understand that we were looking  
23 at calling him at a hearing. At that time it was  
24 30 days away and fully intended to make him  
25 available for an interview by Ms. Do if she wanted.

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1 That didn't happen because instead we got this  
2 demand for our notes.

3 And I just want to make it clear,  
4 Your Honor, that the letter from Ms. Do  
5 specifically stated, first of all, I am sure that  
6 the state is not calling Mr. Ross without first  
7 having had some conversation with him regarding the  
8 his opinions, conclusions and the scope of his  
9 testimony. Mr. Ray requests any and all statements  
10 made by Mr. Ross including without limitations his  
11 own notes and the state's notes memorializing his  
12 statements.

13 That, again, points to the fundamental  
14 disagreement that the parties have if the defense's  
15 statement to the Court during this hearing that  
16 anytime an attorney interviews a witness, that if  
17 the witness makes a statement to the attorney, that  
18 the attorney writes it down, that it is  
19 discoverable. That is not the law in Arizona. And  
20 that certainly is not the law coming out of the  
21 United States Supreme Court.

22 There is harm, Your Honor. And I  
23 explained it, and I'll explain it again. This  
24 is -- this case requires a lot of work, many, many  
25 witnesses, and a trial date that is now just about

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1 three months away if I'm doing my math right.

2 This has a significant chilling effect on  
3 our ability to prepare for trial, that as we  
4 attorneys are interviewing witnesses and taking  
5 notes knowing that the defense believes that they  
6 are entitled to our notes. They are not.

7 And I would urge the Court to look at the  
8 Arizona rules; the general case out of the United  
9 States Supreme Court, the Upjohn case, cases that  
10 look at substantial hardship and rule to grant the  
11 state's motion for protective order making it clear  
12 once and for all that the defense is not entitled  
13 to the attorneys' notes taken in anticipation of  
14 litigation, taken in anticipation of this trial,  
15 unless they can show a hardship, in other words,  
16 that this information is not otherwise available  
17 through interviewing the witnesses or through other  
18 disclosure by the state.

19 Thank you, Your Honor.

20 THE COURT: Thank you.

21 We have run a little bit past the time I  
22 had intended on. I do want to ask a question or  
23 two.

24 Ms. Do, are you saying that anytime an  
25 attorney writes down a statement by a witness made

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1 during an attorney and witness interview that  
 2 that -- that those notes become discoverable? And  
 3 I think we should be making it clear here. I think  
 4 we're talking about trial witnesses. And there can  
 5 be a distinction especially when you're talking  
 6 about experts.

7 But is -- did Ms. Polk accurately  
 8 summarize what you're claiming here?

9 MS. DO: No. I don't believe so, Your Honor.  
 10 I think that, again, we have to look at the  
 11 discovery request in this specific context. We did  
 12 not ask the state to produce notes of the  
 13 hundred-plus witnesses who have been interviewed by  
 14 the sheriff's office for which we have ample  
 15 reports, ample notice, fair warning, of what  
 16 they're going to say.

17 We asked for a statement of an expert for  
 18 whom we had absolutely no disclosure, for whom the  
 19 state intended to call within 17 days, to be exact.

20 I can understand if the Court has concern  
 21 because the state has characterized this as a  
 22 slippery slope. I think that slippery slope is,  
 23 essentially, a fiction. If it were the case that  
 24 the defense believed it was entitled to every  
 25 stitch of notes that the prosecutor takes that

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1 contains the witness statements, we would have sent  
 2 out many, many more requests. That is not our  
 3 position.

4 Our position is simple and it's  
 5 straightforward. They noticed a new expert. They  
 6 gave us no disclosure. They did not give us ample  
 7 time to interview the witness. We wanted to know  
 8 what this witness was going to say in order to  
 9 prepare to confront and cross-examine him under  
 10 Mr. Ray's Sixth Amendment right to a fair trial.

11 And, again, the rule is pretty clear. It  
 12 states that the state has an obligation to disclose  
 13 not only the expert's name but the expert's  
 14 opinions, conclusions and thoughts. We're not  
 15 asking the state to give us a word-for-word purview  
 16 of what this witness is going to say. We're asking  
 17 the state to provide us with more than a five-word  
 18 statement that he's going to testify to group  
 19 behavior.

20 I think that what we're asking for is not  
 21 only reasonable, it's clearly encompassed under the  
 22 rules. The Court relied on the cases that were at  
 23 issue here -- Reed, Nunez -- Justin is new. But  
 24 Reed, Nunez and Roque for the proposition that  
 25 where there is a statement made by a witness for

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1 whom we have not received disclosure and it is only  
 2 memorialized in the prosecutor's notes, then we are  
 3 entitled to it. And that's the situation we have  
 4 here.

5 I fail to understand how the state can  
 6 agree that we are entitled to fair notice of the  
 7 witness and entitled to statements of the witness,  
 8 but as I sit here, Your Honor, I cannot tell  
 9 Mr. Ray what this witness is going to testify to in  
 10 an evidentiary hearing where the state -- I'm  
 11 sorry -- at trial where the state is prosecuting  
 12 him for three counts of reckless manslaughter.

13 I don't understand how the state could on  
 14 these circumstances take the position that Mr. Ray  
 15 has received adequate disclosure in order to  
 16 prepare to meet and confront, cross-examine this  
 17 witness.

18 So to summarize or to state the bottom  
 19 line, Your Honor, it is not our position, it was  
 20 never our position, that we are entitled to every  
 21 piece of note that the prosecutor takes that  
 22 contains a witness statement.

23 It is our position that we are entitled  
 24 to disclosure of what a witness is going to say in  
 25 some form or fashion. And we didn't receive that

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1 in this case.

2 Now, if Ms. Polk is saying something  
 3 different, that this expert is now going to write a  
 4 report, then that changes the analysis. If the  
 5 notes merely contain what is going to be in the  
 6 report, that changes the analysis. But I haven't  
 7 heard that yet.

8 So at this point we're left wondering how  
 9 it is that we're going to get disclosure of this  
 10 expert's testimony.

11 THE COURT: Ms. Polk, is there anything else  
 12 on that point?

13 MS. POLK: No, Judge. I appreciate the  
 14 clarification of the defense position. That was  
 15 not made clear to us in the pleading or in the  
 16 demand letter that we received from them. I still  
 17 feel that I hear Ms. Do saying two things, which is  
 18 where a statement is made by a witness and it's  
 19 written down by the attorney, that it is going to  
 20 be discoverable in the event that the witness does  
 21 not do a report.

22 The cases are clear that the defense can  
 23 interview that witnesses. The cases are clear that  
 24 witnesses do not have to do a report. I don't know  
 25 at this point whether or not Rick Ross will do a

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1 report. But the cases are clear that there is no  
2 requirement that an expert do a report.

3 Now, that expert will be available for an  
4 interview. And the defense is entitled to fully  
5 explore what that expert bases his opinion on. But  
6 I don't agree with the proposition that if that  
7 expert doesn't get a report that they get the  
8 state's notes. The case law, again, does not  
9 support that position.

10 MS. DO: Your Honor, I have to then make sure  
11 that the Court understands our position. If  
12 Mr. Ross is not intending to write a report to  
13 provide us with notice and disclosure of what his  
14 opinions, thoughts and conclusions are about this  
15 case, then I don't think it is adequate to simply  
16 say he's available for an interview. How are we  
17 supposed to know what to ask him if we don't know  
18 what statements he has provided to the state?

19 So it's the state's prerogative to have  
20 their expert not write a report, which is  
21 unfamiliar to me because as a prosecutor you always  
22 have your expert write a report. We intend to have  
23 our expert write a report. But if the state wants  
24 to exercise that prerogative and not have him write  
25 a report, then we are seeking their notes that

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1 contain the statements so that we can not only  
2 fully confront and cross-examine him in trial but  
3 we can conduct a meaningful interview. At this  
4 point what the state is, essentially, asking the  
5 defense to do is just to shoot in the dark.

6 THE COURT: Ms. Polk, that is something that  
7 had occurred to me when you were making your  
8 remarks. If someone shows up at an interview -- if  
9 a defense attorney shows up at an interview and  
10 really doesn't have any kind of idea, anything  
11 definite, it can result in an unproductive  
12 interview while -- you know -- something is  
13 disclosed then and the defense wants to go back and  
14 talk to their expert to see what questions should  
15 really be asked.

16 And I think it gets into the situation  
17 you were saying when you were distinguishing the  
18 Arizona cases, which is if there is nothing else --  
19 of course, that has to do with trial, I think.  
20 Those cases really deal with trial and preparation  
21 for trial. So there is a distinction there.

22 But even at the interview stage it would  
23 have application. And that is if the only form of  
24 disclosure is what the expert has told the attorney  
25 in interview context, that might be what's

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1 available. Isn't that the case, Ms. Polk?

2 MS. POLK: Your Honor, two things. First of  
3 all, again, the Arizona cases do not require an  
4 expert to write a report. But separate from that,  
5 State versus Roque clearly requires the state to  
6 provide notice to the defense about an expert's  
7 opinions.

8 And how that is accomplished -- it can be  
9 accomplished in several different ways. If the  
10 expert does not write a report, then the state can  
11 verbally tell the defense what we anticipate the  
12 expert talking about, or we could perhaps in our  
13 supplemental disclosure list the topics we believe  
14 that expert is going to testify about.

15 What I personally have experienced, and  
16 usually it's the other way around -- in fact, the  
17 case I just wrapped up last week, the defense  
18 attorney noticed about four different experts.  
19 They had not produced a report. They didn't intend  
20 to produce reports. We met to interview them. And  
21 the defense attorney simply told me this expert  
22 will testify in the following areas.

23 And then I interviewed the expert. And  
24 then I turned to the defense attorney and said, is  
25 there anything else I'm missing?

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1 He said, yes. He will also testify about  
2 these things.

3 And so the principal under Roque is  
4 accomplished, which is fair notice to the opposing  
5 side what that expert will testify about. And so  
6 the state has that obligation. One way or another  
7 we have to make -- we have to provide fair notice,  
8 as the defense has to do for the state, what these  
9 people are going to testify about.

10 But the case law is clear that the expert  
11 does not have to do a report. And if they don't do  
12 a report, then we have the obligation to provide --  
13 to fully and fairly disclose the contents of their  
14 expected testimony.

15 But nothing in those cases says that you,  
16 then, are entitled to the attorney's notes taken  
17 with respect. Those are two different areas. One  
18 is work product and the other is full and fair  
19 notice.

20 The state will provide full and fair  
21 notice with respect to all of our witnesses. I'm  
22 not sure at this point what -- if the witnesses  
23 will be providing reports or not. I don't know the  
24 answer to that. But I can't pin the state down in  
25 that regard. But clearly they will get full and

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1 fair notice about what the experts will testify  
2 about.

3 THE COURT: Okay. Thank you.

4 I'll take the matter under advisement,  
5 confirm the hearing dates that have been set.

6 Anything else to address, Ms. Polk?

7 MS. POLK: No, Your Honor. Thank you.

8 THE COURT: Ms. Do?

9 MS. DO: Yes, Your Honor. While the Court is  
10 considering this motion for protective order, I  
11 would ask the Court to look at 15.5. I believe  
12 it's Subsection (c) or (d), which requires the  
13 Court to take custody of the notes that are at  
14 issue and to seal it as part of the record in the  
15 event that the Court issues a protective order so  
16 that Mr. Ray's appellate rights are preserved.

17 So I'd ask the Court if it intends to do  
18 that at this juncture or will we take that up  
19 later?

20 THE COURT: Well, you've noted that rule. And  
21 I have the rules right here.

22 MS. DO: It's 15.5, Subsection (d),  
23 Your Honor.

24 THE COURT: That will be the subject of the  
25 under-advisement written ruling.

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1 STATE OF ARIZONA )  
2 COUNTY OF YAVAPAI ) ss REPORTER'S CERTIFICATE

3  
4 I, Mina G. Hunt, do hereby certify that I  
5 am a Certified Reporter within the State of Arizona  
6 and Certified Shorthand Reporter in California.

7 I further certify that these proceedings  
8 were taken in shorthand by me at the time and place  
9 herein set forth, and were thereafter reduced to  
10 typewritten form, and that the foregoing  
11 constitutes a true and correct transcript.

12 I further certify that I am not related  
13 to, employed by, nor of counsel for any of the  
14 parties or attorneys herein, nor otherwise  
15 interested in the result of the within action.

16 In witness whereof, I have affixed my  
17 signature this 17th day of February, 2012.

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MINA G. HUNT, AZ CR No. 50619  
CA CSR No. 8335

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1 MS. DO: Thank you, Your Honor.

2 THE COURT: Thank you. We'll adjourn on this  
3 matter.

4 (The proceedings concluded.)

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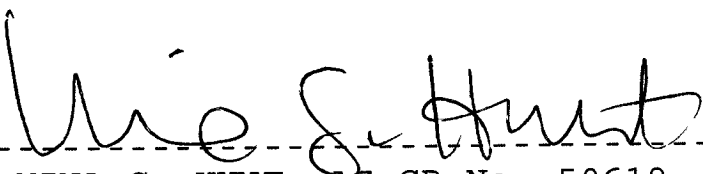
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